

After a complete review of the file and the arguments presented by the parties in their briefs, the Appeals Board finds as follows:

The Appeals Board assumes that this matter came before Administrative Law Judge Shannon S. Krysl on the oral motion of the claimant requesting additional time to submit evidence to rebut the testimony presented by the respondent in a deposition taken August 16, 1995, two (2) days before respondent's terminal date of August 18, 1995. The deposition taken by the respondent contained the testimony of Rayford L. Kimery, a private investigator hired by the respondent, along with his report and videotapes taken during surveillance of the claimant.

Claimant argues that she has been denied due process of law by not being given the opportunity to present evidence to rebut the testimony of the investigator and the video-taped evidence admitted during his deposition. On the other hand, both the respondent and the Kansas Workers Compensation Fund contend that it is entirely in the discretion of the Administrative Law Judge to decide whether rebuttal evidence is presented in any case and such a ruling should not be disturbed, in the absence of a showing that the complaining party has been prejudiced.

Before the Appeals Board can address the merits of this appeal, it must first determine whether it has jurisdiction over the matter at this juncture of the proceeding. After a careful review of the arguments of the parties contained in their briefs, the Appeals Board finds and concludes that it does not have jurisdiction to review this particular order.

The decision of the Administrative Law Judge that denied claimant's oral motion to present rebuttal evidence is interlocutory in nature and made during the litigation of the workers compensation case. This is not a final order that can be reviewed pursuant to K.S.A. 44-551, as amended by S.B. 59 (1995). Neither is this an order that came before the Administrative Law Judge pursuant to the preliminary hearing statute, K.S.A. 44-534a, as preliminary hearing orders are limited to issues of furnishing of medical treatment and payment of temporary total disability compensation. The order now before the Appeals Board pertains to an interlocutory matter, an evidentiary ruling, over which an Administrative Law Judge has authority to adjudicate if called upon during a workers compensation proceeding.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Application for Review filed by the claimant should be, and is hereby, dismissed.

IT IS SO ORDERED.

Dated this ____ day of November 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER**CONCURRING OPINION**

I agree with the opinion the majority finding no jurisdiction to review the preliminary order. However, I believe further clarification is needed. Claimant alleges that she has been denied due process of law by not being given the opportunity to present rebuttal evidence. A finding that a denial of due process had occurred would give rise to Appeals Board jurisdiction pursuant to K.S.A. 44-551, as amended by S.B. 59 (1995). This is because an act, finding, award, decision or ruling made by an Administrative Law Judge which is found to have denied a party due process would be ultra vires and outside the jurisdiction of the Court.

The Kansas Constitution guarantees access to justice for all citizens. It provides:

“All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay.” Kan. Const. Bill of Rights, § 18.

The Appeals Board has the jurisdiction, even at this stage of the proceedings, to address a denial of due process because if one were found to have occurred, such an act would exceed the jurisdiction of the Administrative Law Judge.

In this case, the ruling by the Administrative Law Judge, even if incorrect, would not rise to the level of a denial of a constitutionally protected right. Here, the Administrative Law Judge exercised her discretion on a matter within her authority. I, therefore, concur with the finding by the Appeals Board.

BOARD MEMBER

c: Roger A. Riedmiller, Wichita, Kansas
Frederick L. Haag, Wichita, Kansas
John C. Nodgaard, Wichita, Kansas
Shannon S. Krysl, Administrative Law Judge
Philip S. Harness, Director